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Rest, J.I. van der; Heidary, K.

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Personalised pricing under the current European legal framework: a call for ethics, sustainability and responsibility in the age of artificial intelligence

Jean-Pierre van der Rest*  & Kimia Heidary 

Department of Business Studies, Leiden University, The Netherlands

*Correspondence: j.i.van.der.rest@law.leidenuniv.nl

ABSTRACT: As pricing in hospitality and tourism evolves due to the opportunities presented by artificial intelligence (AI), so do the concerns that come with technological advancements. There is a fine line between what is possible, what is profitable, and what is ethical, sustainable and responsible in the use of AI for pricing. This viewpoint article draws attention to the dark side of pricing, and presents a framework towards sustainable pricing, against the backdrop of the current European Union legal framework. The framework includes ethical guidelines, self-regulation, self-protection and technological regulation, which should be considered as a whole.

KEYWORDS: algorithmic pricing, deceptive marketing, hospitality, legal, personalisation, tourism

Introduction

Deception in the marketplace, especially when it comes to prices, has been considered unfair and unjust for years. As early as Roman times, the concept of a just price was part of the intellectual discourse on setting fair and equitable prices in (free) commercial transactions. Building on what the Romans essentially saw as a bilaterally negotiable price, the just price concept became part of the theological debate during the Middle Ages, where it was intertwined with early market thinking and Christian ethics on social justice, charity and the moral responsibility of merchants and buyers (Kerf, 2010). With the rise of cities and centuries of economic change, the role of the church in shaping public policy and social norms gradually reduced. Transforming the economic and social landscape, roughly spanning from the 11th to the 16th centuries, a commercial revolution spawned new, less pious social classes, making honesty and transparency, the two essential virtues that promote civilised behaviour, crucial to the functioning of markets and the well-being of society as whole (McCloskey, 2006). Price fairness, the equitable and just treatment of consumers, without discrimination, bias and favouritism, with pricing outcomes and procedures that are perceived as fair, has received great research interest ever since, not only in business and marketing (e.g. Martins & Monroe, 1994; Xia et al., 2004; Kwak et al., 2015; Bambauer-Sachse & Young, 2023), but also in hospitality and tourism (e.g. Oh, 2003; Chung & Petrick, 2015; Wang et al., 2023).

With the rise of artificial intelligence (AI) in e-commerce, a new commercial revolution may have arrived (Osei et al., 2020; Chon & Hao, 2024; O'Connor, 2024), challenging the secular system of governance and the rule of law, without the influence of religious institutions in political and social affairs (Smith, 2010).

The transformation towards AI technology-based experiences (e.g. Li et al., 2021; Ghesh et al., 2023), robotics (e.g. Cain et al., 2019; Ivanov et al., 2019), and big data (e.g. Samara et al., 2020; Lee et al., 2021) is anticipated to impact the hospitality and tourism research agenda for years to come (Cain et al., 2019; Lv et al., 2022; Law et al., 2023). Yet, while there is ample research on its application and use (e.g. Doborjeh et al., 2022; Saydam et al., 2022; Kong et al., 2023; Dwivedi et al., 2024), little attention is given to the dark side (Grundner & Neuhofer, 2021; Ivanov & Umbrello, 2021). Expecting a dramatic increase of the scope and use of dynamic pricing, due to advancements in technology, Nunan and Di Domenico (2022, p. 458) identify sources of perceived inequity that come with AI-driven dynamic pricing and the governance mechanisms needed to deal with ethical issues, "with potentially serious consequences if managers are not able to effectively address them", such as more waste of consumer efforts (e.g. hassle costs), less agency (e.g. outcome responsibility), less autonomy (e.g. algorithms starting to drive price competition instead of market demand), more bias (e.g. new discrimination grounds) and, importantly, more collusion (e.g. without human intervention). Loots and den Boer (2023, p. 1169) demonstrate that the risk of tacit collusion by self-learning pricing algorithms is present "and deserves the attention of lawmakers and competition policy regulators", especially when firms use an algorithm of the same vendor in the absence of human communication and horizontal co-ordination. De Marcellis-Warin et al. (2022, p. 259) warn about dark patterns, "nudges" and "sludges", where search discrimination is achieved through pricing (and recommender) algorithms that "aim to alter consumers' freedom of choice or manipulate their decisions", with artificial intelligence enhancing opportunities for consumer deception and competition distortion. According

to Van der Rest et al. (2020, p. 113) scholarly attention should be given to the ethical implications of legal forms of indirect price discrimination, "through which consumers will be allowed to 'freely' sort themselves into different microsegments, especially when the 'self-selection' is enticed by deceptive personalized applications of psychological pricing and neuromarketing".

This viewpoint article draws attention to the legal, ethical and policy challenges that may arise with the advance of AI in pricing, especially online personalised pricing, and the implications these challenges have for pricing in hospitality and tourism. It seeks to spark a broader discussion on responsibility and sustainability in algorithmic pricing, in particular looking at opacity, dishonesty, injustice and deception in online hospitality and tourism price personalisation.

Dark side of business

In *The Predatory Society*, Blumberg (1989) provides a detailed analysis of the extent of immoral behaviour that characterised the American marketplace of the twentieth century. Dishonesty is the norm rather than the exception. Years later Bousk et al. (2015, p. xi) reiterate that

[d]eception permeates the American marketplace. Deceptive marketing harms consumers' health, welfare and financial resources, reduces people's privacy and self-esteem, and ultimately undermines trust in society. Individual consumers must try to protect themselves from marketers' misleading communications by acquiring personal marketplace deception-protection skills that go beyond reliance on legal or regulatory protections. Understanding the psychology of deceptive persuasion and consumer self-protection should be a central goal for future consumer behavior research.

The discipline of psychology is deeply intertwined with the development of this market culture, with a questionable role for the science of deception in business practice and in institutions such as courts and bureaucracies (Pettit, 2013), and the conditions it has provided for deceptive and unfair marketing practices (Aditya, 2001), including the justifications for them (Levine & Duncan, 2022).

Common deceptive practices include misleading advertising (Hastak & Mazis, 2011; Xie et al., 2015), fictitious pricing (Staelin et al., 2023), unfavourable price errors (Bozkurt & Gligor, 2019), fake reviews (Malbon, 2013), as well as product slandering (Song et al., 2019) and problematic information (Di Domenico & Visentin, 2020; Di Domenico et al., 2021), in addition to much less obvious cases, such as tactics to discourage search (Lindsey-Mullikin & Petty, 2011), practices that create confusion (Kasabov, 2015; Chauhan & Sagar, 2021), ambient scents (Bradford & Desrochers, 2009) and covert marketing (Martin & Smith, 2008). Moreover, malpractices found in hospitality and tourism include fraud (Kassem, 2024), tourism scams (Xu et al., 2021), visual deception (Fang & Xiang, 2023; Sivathanu et al., 2023; Christensen et al., 2024), fake reviews (Akhtar et al., 2019; Fong et al., 2022), fake news (Vasist & Krishnan, 2022), dark patterns (Kim et al., 2023), greenwashing (Zhao et al., 2024) and price obfuscation (Chiles, 2021). In the context of pricing, dark patterns refer to design techniques used in online tourism agencies' user interfaces to entice hotel guests to make a booking they would not otherwise make, such as by making false claims of urgency or scarcity. Price obfuscation involves manipulating travellers into making a

booking based on incomplete or inaccurate information, such as charging hidden resort fees.

Technological advances will continue to provide marketers with the tools to mislead consumers (Kimmel, 2001; Davenport et al., 2020). Because research shows that security, privacy, reliability and non-deception are strong predictors of online consumer satisfaction, loyalty and trust (e.g. Román, 2007; Riquelme et al., 2016), AI will pose a difficult dilemma to the hospitality and tourism sector in the coming years, between what is possible, what is profitable, and what is ethical, sustainable and responsible (ESR). Starting with creating customer value from a relationship perspective, hospitality and tourism firms must first determine their core moral values before they can commit to creating sustainable hospitality and tourism for future and current generations, and the actors need to act responsibly towards their digital stakeholders.

Worries that come with personalisation

With the rise of digital technology, personalisation is becoming an important component of online value creation (Montgomery & Smith, 2009). Personalised pricing, one of many forms of personalised marketing — also called customised or targeted pricing — is a pricing strategy commonly identified with first-degree price discrimination (i.e. individual-level pricing), although not necessarily so narrowly defined in legal and regulatory considerations where it may include third-degree price discrimination (i.e. group-level pricing) as well. Personalisation is applied to pricing in various ways, such as offering personalised discounts or bundle prices, using personalised price points or upselling, or personalising the factors used to dynamically adjust prices.

By using artificial intelligence, there is considerable potential for personalised pricing (Chandra et al., 2022). As a potential driver of revenue per available room (RevPAR; Enz et al., 2016), it is expected that hospitality and tourism firms will invest in the strategic resources needed to develop such pricing capability (Van der Rest & Roper, 2013), for example by learning how willingness to pay interacts with lead time (Arenoe & Van der Rest, 2020), how indirect price discrimination influences the perception of fairness (Alderighi et al., 2022), and how price personalisation, search personalisation, recommender personalisation and service product customisation should be integrated with e-commerce, social media and internet marketing activities, preferably in real time.

The rise of personalised pricing has caused great concern in the legal literature. The normative assessment concerns the trade-off between consumer harm and market efficiency, which is considered disconcerting, for example, when consumers cannot opt out (Wagner & Eidenmuller, 2019), misperceptions increase demand (Bar-Gill, 2019), disclosures fail (Van Boom et al., 2020), personal data are hard to classify (Li, 2022), privacy problems arise (Zuiderveen Borgesius & Poort, 2017), or when abuse of power threatens social democracy (Stucke & Ezrachi, 2017).

Consumers generally dislike personalised pricing (Poort & Borgesius, 2019; Boerman et al., 2021). For example, Hufnagel et al. (2022) found negative attitudinal and behavioural responses for both disadvantaged and favoured consumers, regardless of the underlying data that are used. Exploring the utilisation of big data, Shang et al. (2023) found that perceived deception, price unfairness and threat appraisal negatively impact tourists'

continued usage intention of mobile booking apps, albeit switching cost moderates (weakens) this relationship. Examining the exercise of digital power via algorithmic price discrimination, Chen et al. (2023) found a negative effect on customer loyalty via reduced platform ethical and CSR perceptions, and this effect is larger for consumers with high price sensitivity and initial trust. In this context, Liu and Sun (2024) show that unfairness, unaccountability and opaqueness of algorithmic processes reduce algorithmic legitimacy, which in turn reduces continuous usage intention.

However, there are also other, less negative views, such as that personalised pricing improves welfare (Ren et al., 2024), and that the normative assessment of personalised pricing should better align economic theory with regulatory policy (Carroll & Coates, 1999), or that as personalised pricing becomes the norm in hospitality and tourism, perceptions of unfairness will decrease (Garbarino & Maxwell, 2010).

Attempts to set legal standards for minimal behaviour

Under the current European legal framework, algorithmic pricing seems to fall somewhat through the cracks of legal regulation. Few legal provisions speak directly to online personalised pricing and while there are four relevant fields of law — consumer law, data protection law, anti-discrimination law and competition law — that may pose indirect boundaries on the (use of) the practice, their application remains uncertain (Van der Rest et al., 2020; Sears, 2021). The most recent initiative to address personalised pricing was brought forward in Article 4 of the Omnibus Directive (2019/2161/EU), which amended Article 6 of the Consumer Rights Directive (2011/83/EU), requiring companies to disclose the use of personalised pricing where applicable. As such, personalised pricing is permitted under the current legal European framework, as long as consumers are informed about the use of the practice by companies (see also Recital 45 of the Omnibus Directive).

This use of personalised pricing must stay within the boundaries of the above four legal fields. For example, certain grounds cannot be used for personalised pricing (without explicit consent), such as ethnicity, sexual orientation and health data (see e.g. Article 9 GDPR and Article 21 EU Charter of Fundamental Rights). The use of personalised pricing could also constitute an abuse of dominance under competition, although scholars have argued that establishing a dominant position — the first legal step — will likely prove to be a great hurdle (Botta & Wiedemann, 2019; Sears, 2021). As for the prohibited grounds, there are many possible workarounds for companies that could in principle enable them to discriminate between consumers. For example, companies could use proxies, where a facially neutral ground is used as a stand-in for a legally protected characteristic. Artificial (synthetic) data can be generated and trained to reproduce the characteristics and structure of the original data. Although indirect discrimination is in principle also prohibited (see for example Article 2(2)(b) of the Racial Equality Directive), there are observable hurdles in (a) observing differential treatment and (b) proving that (indirect) price discrimination has taken place on the grounds of prohibited grounds (Van der Rest et al., 2020; Sears, 2021). Due to the complexity and a lack of transparency that accompanies the underlying mechanisms of personalised pricing, scholars have therefore raised concerns about the extent to which the current legal framework is “fit”

to address challenges associated with personalised pricing (Moriarty, 2021; Sears, 2021).

As part of the EU's ambition to further shape the European digital market, recent legislative acts such as the Digital Services Act (DSA), Digital Markets Act (DMA) and the AI Act aim to ensure better protection of fundamental rights of online users, promote transparency and accountability of online services and artificial intelligence, as well as ensure an innovative and competitive level playing field for businesses. Interestingly, there is no mention of personalised pricing in these acts. There are, however, stricter requirements set in place in the DSA for targeted advertisements and recommender systems: users must now be informed about the main parameters used to determine the targeted advertisement or recommendation (Article 26(1)(d) and 27(1) DSA). Online platforms may no longer base such advertisements on special categories of personal data as stated in Article 9 GDPR (Article 26(3) DSA). Additionally, minors may not see any targeted advertisements at all (Article 28(2) DSA). The DMA proposes additional accountability requirements for so-called “gatekeepers”, such as submitting an audit to the European Commission with an overview used for consumer profiling, which needs to be updated yearly (Article 15 DMA). Given that it is highly conceivable that “non-gatekeepers” will (also) engage in personalised pricing, the DMA does not seem to impose any concrete boundaries on personalised pricing either. Lastly, the newly adopted AI Act proposes more stringent requirements for AI systems that constitute a “high-risk” (i.e. negatively affecting safety or fundamental rights; see Article 6 and Annex III AI Act). One example is AI systems providing social scoring of natural persons by public or private actors. Surprisingly, the consumer-facing AI systems used for personalised pricing do not seem to fall under the AI Act's provisions for “high-risk” algorithms, even though the underlying mechanisms and associated risks show considerable overlap with the AI applications marked as high-risk (e.g. considering individual behaviour and personal traits to evaluate creditworthiness of natural persons; Annex III under 5(b) AI Act). As such, requirements such as logging, auditing and human oversight do not apply to the AI systems underlying personalised pricing and thus it boils down to the limited transparency requirements already in place.

Under the current European legal framework, there are no clear norms for minimum standards of behaviour beyond the requirement to disclose that personalised pricing is taking place. Personalised pricing is allowed — within certain boundaries — if its use is communicated by companies. Not disclosing that personalised pricing is taking place would be a breach of consumer law. To date, no company has stated in its terms and conditions or privacy policies that it engages in this practice. It would be too short-sighted to conclude that this must mean that there are currently no (hospitality and tourism) companies engaged in personalised pricing. Anecdotal examples of this practice that have come to light give us reason to believe that personalised pricing is happening (Baker et al., 2001; Authority for Consumers and Markets [ACM], 2022). Companies are aware of the negative perceptions surrounding the practice, which could prompt them to explore more covert forms, or frame the personalised price as a discount to mitigate negative consumer responses (Heidary et al., 2022).

Towards sustainable pricing

The limited level of legal protection and lack of guidance on clear norms of minimum standards of behaviour, paired with the profitability that the use of price personalisation algorithms might bring for companies, raises the question of whether there are alternative routes to formulate minimum standards for company behaviour. As a starting point, the pursuit of profit maximalisation, conversion and persuading consumers to purchase hospitality and tourism services is allowed under the freedom of entrepreneurship *ex Article 16 of the EU Charter of Fundamental Rights (2012/326/EU)*. However, there is a fine line between persuasion and deception. Persuasion necessitates the creation of customer value, and even then it will not be easy to change consumer beliefs, attitudes and intentions (e.g. Friestad & Wright, 1994; Hardesty et al., 2007; Eisend & Tarrahi, 2022). For persuasion to be ethical it must be transparent, honest and respect consumer autonomy, such as the right to make an informed decision based on legitimate marketing communication. As the effects of persuasive messages are limited (Sherif & Hovland, 1961; Schultz et al., 2007), deceptive pricing lurks, and scholarly attention is warranted (e.g. Lindsey-Mullikin & Petty, 2011; Deng et al., 2018; Riquelme & Román, 2023; Staelin et al., 2023).

Several (national) authorities have emphasised the need to regulate potential deceptive applications of personalised pricing (OECD, 2018). Yet, a collective and holistic approach that considers self-regulation, consumer self-protection and inclusion of ethical pricing in companies' responsibility and sustainability strategies is still missing (Van der Rest et al., 2022). This avenue is important to consider, given the limited protection of the current legal framework and the more complex and opaque direction in which personalised pricing is expected to develop (Townley et al., 2017).

Currently, one of the main constraints on companies' personalised pricing behaviour is the fear of consumer backlash (Odlyzko, 2003; Heidary et al., 2022). Anecdotal instances of personalised pricing that have come to light have been met with strongly negative consumer reactions (Baker et al., 2001), and surveys on consumer perceptions of personalised pricing show predominantly negative perceptions (Turow et al., 2009; Poort & Borgesius, 2019). Companies seem to be aware of these negative consumer perceptions (Heidary et al., 2022). Garbarino and Maxwell (2010) found that pricing practices that violate an establish pricing norm — such as personalised pricing where it is least expected — leads to negative perceptions and individual actions designed to punish the company that breaks the norm. However, as personalised pricing is expected to become increasingly complex and opaque, it might become more difficult for consumers — and national enforcement authorities — to detect personalised pricing practices and act accordingly.

Going forward, to complement current shortcomings in the legal framework and to address social and economic sustainability challenges associated with personalised pricing, ethical guidelines, self-regulation, self-protection and technological regulation should be considered as a whole. It is in hospitality and tourism companies' best interests to create and adopt self-regulation to maintain consumer trust and to set in place guidelines for a minimum standard of behaviour when engaging in personalised pricing. These guidelines should include principles of ethical personalised pricing, as a response

to the European Commission's emphasis on the role of principle-based self-regulatory measures in creating a better and balanced regulatory framework (European Commission, 2016). In general, such self-regulation is quite an attractive market-based solution, as it would foster alignment between companies, including the development of compliance logic and tools to self-assess risks, echoing the approach taken in corporate social responsibility (De Marcellis-Warin et al., 2022), and would generally have low administrative costs (Weber, 2014). From here, collaboration with national enforcement authorities can be explored, setting up co-regulatory measures where the self-regulatory framework can serve as an enforcement tool. Exploring such cooperation and taking company perspectives into account would be a valuable enhancement of the existing legal framework.

Figure 1 illustrates that going forward involves a tripartite solution (Li et al., 2023), where companies and regulators share responsibility for developing and implementing personalised pricing regulations, compliance logic and tools for risk assessment, in addition to promoting consumer self-protection measures such as utilising counter algorithms and social media to bring to light company deception. In this context, consumer education is an important dimension that is often overlooked. For example, Xie et al. (2022) find a moderating effect of moral self-awareness in the relationship of perspective taking and ethical tolerance, inasmuch that consumers are less tolerant of deception when their moral self-awareness is high. As such, improving moral self-awareness (among the younger generations) can promote consumer empowerment. A similar insight involves persuasive knowledge acquisition. For example, Petrescu et al. (2022) show that while there are critical deception cues that are hard to detect, enhancing the level of suspicion helps consumers to better protect themselves. Choi et al. (2021) show how tourists variously apply information filtering heuristics, where credibility affects the cognitive process in trust formation, but scepticism evokes an emotion in the form of distrust. Of particular interest is their finding that suspicious information is considered credible when consumer involvement is low. It is thus a priority to educate consumers to adopt a healthy level of suspicion and scepticism. For example, government social media efforts could promote media literacy (e.g. teaching Generation Z and Generation Alpha to recognise and critically analyse deceptive practices), school curricula could include consumer rights and business ethics education, and positive role models could inspire these young people to prioritise moral values in their consumer decisions. However, according to Gupta (2023), even with high levels of consumer sophistication, stricter regulation will remain necessary. Since regulatory exposure of deceptive marketing has a significant negative impact on firm value (Tipton et al., 2009), as a starting point this may not be such a bad idea. We therefore present two concrete steps for policy and further research.

First, personalised pricing seems to fall through the cracks of the EU legal framework and newer regulatory initiatives such as the DSA, DMA and AI Act. Although there is an overlap with AI applications currently categorised as "high-risk" due to their potential to harm fundamental rights, personalised pricing and its consumer-facing AI systems are currently only bound by the information requirement and the outer bounds of rightful data. As such, there is still a large grey area untouched by regulation and policy that, driven by a clear economic incentive, prompts companies to explore this area. The tension between

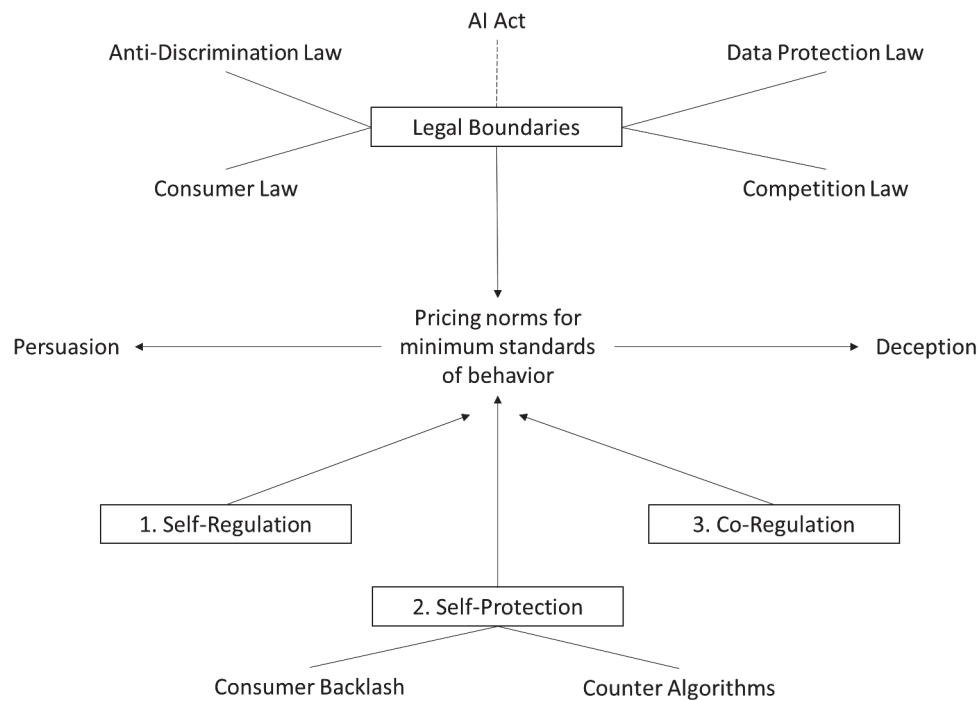


FIGURE 1: A shared responsibility framework for sustainable pricing in hospitality and tourism

the economic incentives of companies and consistent public dislike will likely persist, and poses challenges for regulatory policy in terms of how much can (and should) be regulated. The desired role of policy should be explored further. Due to the lack of a sufficiently entrenched norm and the complexity of the underlying technology, neither a blanket prohibition, nor giving the market free reign, are the likely ways to go forward. Instead, policymakers should invest in a tripartite solution, where all three parties (i.e. companies, consumers, government) take on a part of the responsibility. Otherwise, corporate profitability will come first, to the detriment of ethics, sustainability and responsibility.

That is why, second, there is a large role for a system of co-regulation, where companies formulate a self-regulatory framework that can serve as an enforcement tool. We observe a similar trend in the Dutch insurance sector, where insurance companies formulated a binding ethical framework for data-driven decision-making, building on seven key requirements (i.e. human autonomy and control; technical robustness and security; privacy and data governance; transparency; diversity, non-discrimination and justice; social well-being; and accountability) for trustworthy AI as brought forward by the AI High-Level Expert Group of the EC. For each requirement, the insurance sector formulated accompanying norms relevant to their daily operations. We see opportunities for a similar self-regulatory framework in the hospitality and tourism sector, that can in turn serve as an enforcement tool and allow for co-operation with national enforcement authorities. The role of such a co-regulatory approach and the preliminary design of the self-regulatory ethical framework should be explored in academic research further, for example through focus groups, expert interviews and the examination of existing ethical frameworks.

Third, although the government and companies can take on a large part of the responsibility for ethical pricing, there also

exists a responsibility for consumers to remain vigilant when navigating prices. We have put forward some routes through which this might be accomplished, such as promoting digital literacy and education in business practices. However, to gain more sense of the challenges at hand, it is also important that future research considers how personalised pricing impacts consumer empowerment and collective empowerment, in particular its associated effects on bargaining power, ability to compare prices, informed choice and sense of agency and self-determination. From there, it can be assessed what tools could be introduced to help consumers navigate (personalised) pricing. For example, another fruitful line of academic research would be to investigate the effect of consumer empowerment on the choice to opt-out from personalised pricing, and vice versa. The tripartite model that we have proposed in this article is likely the way forward. It is only by sharing responsibility that the scope of the matter at hand can be assessed and addressed.

ORCID iDs

Jean-Pierre van der Rest — <https://orcid.org/0000-0001-5628-6499>

Kimia Heidary — <https://orcid.org/0000-0002-1976-927X>

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